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IN THE
Supreme Court of the United States

IN THE MATTER OF THE VISITATION OF NATALIE ANN TROXEL AND ISABELLE ROSE TROXEL, MINORS, JENIFER AND GARY TROXEL,
Petitioners,
v.
TOMMIE GRANVILLE,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Fourteenth Amendment liberty interest in parental autonomy prohibits a State from granting a grandparent visitation with a grandchild when it serves the best interests of the child.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or

The Court has long recognized that "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593 (1890). In response to such phenomena as rising divorce and illegitimacy rates, all fifty States have enacted third-party visitation statutes under which a child's grandparents can petition for visitation rights under certain circumstances. *See* Richard S. Victor *et al.*, *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 Fam L.Q. 19, 22 (1991). These statutes commonly require that the person seeking visitation rights establish that visitation is in the "best interest of the child." *See id. at* 22-23, 26-51.

While the Court has held that the Due Process Clause provides a parental liberty interest in "bring[ing] up children," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the scope of this interest has not been precisely defined. The Court's cases establish, however, that where state regulation of this interest does not impinge upon some other constitutional right, it is valid if it has a "reasonable relation to any end within the competency of the state." *Id.* at 403. That all 50 States have enacted similar statutes demonstrates that it is not arbitrary or irrational to grant grandparents the statutory right to petition for visitation with their grandchild.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

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entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Natalie Anne Troxel, who is ten years old, and Isabelle Rose Troxel, who is almost eight, are the children of Brad Troxel and Tommie Granville, and the grandchildren of Jenifer and Gary Troxel ("the Troxels"). Pet. App. 2a, 55a, 73a. Brad and Tommie were not married, and their relationship ended in June 1991, when Natalie was one and a half years old and six months prior to Isabelle's birth. Pet. App. 55a, 73a. After Brad and Tommie's separation, Brad lived with his parents and "regularly brought Natalie and Isabelle to [their grandparents'] house for weekend visitation." *Id.* at 55a.

Brad committed suicide in May 1993. *Id.* Thereafter, "the Troxels saw Natalie and Isabelle regularly, though the girls did not stay overnight at the Troxel residence." *Id.* at 56a. In October 1993, Granville "informed the Troxels that she wished to limit visitation to one short visit per month." *Id.* The Troxels did not agree to this and did not see Natalie and Isabelle at all between October and December 1993. *Id.*

In December 1993, the Troxels commenced this action under R.C.W. § 26.10.160(3), seeking court-ordered visitation with their granddaughters. Pet. App. 56a. The trial on the Troxels' visitation petition was held in December 1994; the court made the following findings:

> [The Troxels] are part of a large, central, loving family, all located in this area, and [the Troxels] can provide opportunities for the children in the areas of cousins and music . . . . The children would be benefited from spending quality time with [the Troxels], provided that that time is balanced with time with the children's nuclear family. The court finds that the children's best interests are served by spending time with their mother and stepfather's other six children.

Id. at 74a.

The Troxels petitioned for "two weekends of overnight visitation per month and two weeks of visitation during the summer." *Id.* at 56a. Based on the evidence, the trial court entered a visitation decree providing for visitation of approximately one weekend day per month (from 4:30 p.m. on Saturday to 6:00 p.m. on Sunday), one week in the summer, and four hours on each girl's birthday. *Id.* at 56a, 75a, 77a-78a.

SUMMARY OF ARGUMENT

1. The Court has recognized a liberty interest under the Due Process Clause in parents to "establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Court has explained that "[t]he established doctrine is that this liberty may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Id.* at 400.

The Court has not precisely defined the contours of this liberty interest. The Court's cases make clear, however, that the scope of protection granted this interest depends upon the degree to which the State is impinging on a constitutional right. As *Wisconsin v. Yoder* explained, "when the interests of parenthood are combined with a free exercise claim . . . more than merely a reasonable relation to some purpose within the competency of the State is required to sustain the validity of the State's requirement under the First Amendment." 406 U.S. 205, 223 (1972) (internal quotation omitted). Absent infringement of some other constitutional right, state action which implicates the parental liberty interest in bringing up children must be sustained if it has a "reasonable relation to some purpose within the competency of the State." *Id.* at 233 (citation and quotation omitted).

2. The Washington Supreme Court erred in subjecting the State's third-party visitation statute to strict scrutiny. Contrary to the reasoning of the lower court, where no fundamental right is implicated the State is not limited to acting only to protect children from harm. Granting grandparents the statutory right to petition for visitation is simply an exercise of the State's traditional authority to establish the law of domestic relations. " 'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.' " *Boggs v. Boggs*, 520 U.S. 833, 848 (1997) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)). A state law regulating domestic relations is thus subject to review under the Due Process Clause only in the same sense that any state law is reviewable for arbitrariness or irrationality. The Court has been "reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The exercise of restraint is especially necessary in an area which, since the founding, has been the exclusive province of the States. There is simply no clear and substantial federal interest which justifies subjecting the statute to scrutiny under a standard more onerous than rational basis review.

3. Washington's visitation statute is reasonably related to the State's regulation of domestic relations. Washington's legislature, like those of the other forty-nine States, has recognized that the family unit is not limited to the traditional nuclear family and that persons such as grandparents can also properly be deemed part of the family. With an estimated 40 to 50 percent of all children expected to experience their parents' divorce, and 32 percent of children born out of wedlock, the States, in enacting

grandparent visitation statutes, have responded to the reality of modern life. That reality is that grandparents frequently take on major responsibilities in caring for the children, that grandparents play important roles in the lives of their grandchildren by serving as mentors, role models or family historians; that a grandparent's love for a grandchild is not conditioned on whether the child was born in wedlock and does not end with a divorce or death of a parent; and that parents have been known to renege, for unwarranted reasons, on their moral obligation to allow grandparent visitation. The States are entitled to recognize the interests of grandparent and grandchild in preserving their relationship, notwithstanding the objection of the parent.

Granting grandparents the statutory right to petition for visitation subject to showing that visitation "serves the best interest of the child," R.C.W. § 26.10.160(3), bears "a reasonable relation to some purpose that is within the competency of the State." *Meyer*, 262 U.S. at 400. Visitation is at most a minor interference with the parental liberty interest. Moreover, that the grandparent must prove that visitation serves the best interest of the child provides adequate protection against the arbitrary application of the statute. Under Washington law, a court may consider such factors as the strength of the relationship between the grandparent and grandchild, the nature of a parent's objection to granting visitation, and whether a petitioner has a history of criminality or abusive conduct. *See* R.C.W. § 26.09.240(6). Where a visitation statute provides such guidance to the trial court, it bears a "reasonable relation" to the State's interest in reconciling the rights of grandparent, parent, and child, and is thus not an "arbitrary" or "irrational" interference with the parental liberty interest in directing the upbringing of one's children.

ARGUMENT

THE FOURTEENTH AMENDMENT LIBERTY INTEREST IN PARENTAL AUTONOMY DOES NOT PROHIBIT A STATE FROM PROTECTING AN ESTABLISHED RELATIONSHIP BETWEEN A GRANDPARENT AND A GRANDCHILD WHICH IS IN THE BEST INTERESTS OF THE CHILD

The Washington Supreme Court erred in holding that the State's third-party visitation statute violates the Due Process Clause of the Fourteenth Amendment. In so holding, the court deemed the liberty interest in parental autonomy recognized by this Court to rise to the level of a fundamental right, thus requiring invalidation of the statute absent a showing that it serves "a compelling state interest and such interference is narrowly drawn to meet only the compelling state interest involved." Pet. App. 15a. It further concluded that the Fourteenth Amendment prohibits the State from acting only where the State can show "parental unfitness, harm or threatened harm" to a child. *Id.* at 16a.

This Court has long recognized that the Due Process Clause provides a parental liberty interest in "bring[ing] up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The scope of this liberty interest, however, has not been precisely defined. The Washington Supreme Court's holding breaks new ground, expanding substantive due process well beyond this Court's precedents and into the area of domestic relations, which has long been recognized as an exclusively state concern.

With the decline of the traditional nuclear family, all fifty state legislatures have recognized the important role that grandparents and other relatives can play within the family unit. That all fifty States have enacted statutes similar to Washington's demonstrates that there is nothing

arbitrary in granting visitation to grandparents who can show that such visitation is "in the best interests of the child." As these statutes demonstrate, whatever the scope of a parent's liberty interest to be free from arbitrary state interference in child-rearing decisions, there is no established tradition of denying visitation to a grandparent who has a significant relationship with a child where the visitation is in the best interests of a child. The States' unanimous recognition that with the decline of the traditional nuclear family grandparents and their grandchildren have substantial interests in preserving their established relationships should not be overturned on the basis of a constitutional provision which is silent on the matter.

A. A State Law Which Implicates Only The Liberty Interest In Parental Autonomy And Not Some Other Constitutional Right Is Subject To Review Only For Arbitrariness

In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), this Court first recognized that the substantive component of the Due Process Clause includes a liberty interest in parents to "establish a home and bring up children." The Court further explained that "[t]he established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Id.* at 400.

In *Meyer*, the Court overturned the conviction of a school teacher who violated a state law which prohibited the teaching of foreign languages to students who had not passed the eighth grade. *Id.* at 397. While the Court explained that the liberty guaranteed by the Fourteenth Amendment included the teacher's right "to teach and

the right of parents to engage him so to instruct their children," *id.* at 400, it did not apply strict scrutiny. Rather the Court recognized the patent arbitrariness of a statute which had been interpreted to allow the teaching of " 'so-called ancient or dead languages' " such as "Latin, Greek, [and] Hebrew," while "German, French, Spanish, Italian, and every other alien speech are within the ban." *Id.* at 400-01 (quoting *Nebraska Dist. Evangelical Luth. Synod v. McKelvie*, 187 N.W.2d 927 (Neb. 1922)). As the Court reasoned, "the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state." *Id.* at 403.

Two years later, the Court relied on the parental liberty interest in directing the education of their children to invalidate a state law which compelled public school attendance. *See Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). In *Pierce*, the Court reaffirmed that state laws which interfere with this liberty interest must have a "reasonable relation to some purpose that is within the competency of the State." 268 U.S. at 535. The Court explained that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public school teachers only." *Id.* The Court further stated: "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." [2]

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[2] *Wisconsin v. Yoder*, 406 U.S. 205 (1972), went well beyond *Pierce* in invalidating a state law requiring school attendance up to the age of 16.

While the opinion in *Pierce* made no reference to the free exercise clause, appearing to decide the case solely on the basis of the Due Process Clause, the Court has subsequently explained that the case rested on "the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). And in *Wisconsin v. Yoder,* the Court explained *Pierce* in the following manner:

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations."

406 U.S. at 214 (quoting 268 U.S. at 535); *see also id.* at 233 ("*Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.").

Although the Court has recognized a parental liberty interest in bringing up children, the scope of protection granted that interest depends upon the degree to which the State is impinging on some other constitutional right. *See id.* ("[w]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment"). In *Prince,* the Court explained that "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty . . .

[a]nd neither rights of religion nor rights of parenthood are beyond limitation." 321 U.S. at 166. The Court emphasized "that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Id.* at 167.

Thus, in *Prince* the Court upheld the application of a state child labor law to a "parent" who took a child in her custody with her when she distributed religious publications on a public street. *See id.* at 159-71. It did so notwithstanding that the "parent" raised claims based on both the Free Exercise Clause and the Due Process Clause. *See id.* at 164. Furthermore, it rejected the argument that the statute could not be applied "unless shown to be necessary for or conducive to the child's protection against some clear and present danger" and that "[t]he child's presence on the street, with her guardian, distributing . . . the magazines . . . was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited." *Id.* at 167. The Court acknowledged that "the presence of the child's guardian . . . may lessen the likelihood that some evils the legislation seeks to avert will occur." *Id.* at 169. The Court, however, found the regulation justified, reasoning that it is "wholly inappropriate for children, especially of tender years, to face" the situations which arise in the course of "propagandizing" and that the State could protect children from this as well as the "[o]ther harmful possibilities [that] could be stated, of emotional excitement and psychological or physical injury." *Id.* at 170.

The *Prince* Court's willingness to hypothesize potential justifications for the statute clearly refutes the Washington Supreme Court's conclusion that the liberty interest in parental autonomy is of such a magnitude that the visi-

tation statute can only be sustained if the State has "a compelling interest" and the statute "is narrowly drawn to meet" that interest. *See* Pet. App. 15a. Rather, the Court's holdings establish that where state action does not unduly burden a fundamental right beyond the parental liberty interest in bringing up children, it must be sustained if it has a " 'reasonable relation to some purpose within the competency of the State.' " *Yoder*, 406 U.S. at 533 (quoting *Pierce*, 268 U.S. at 534-35).[3] This is the appropriate standard to apply here where there is no allegation that Washington's visitation statute burdens some other constitutional right.

B. Regulating Domestic Relations Is A Longstanding Area Of State Authority

The Washington Supreme Court read this Court's precedents as limiting the State's power to intrude on the liberty interest in parental autonomy only where the State acts

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[3] In its attempt to define the nature of the liberty interest in parental autonomy, the Washington Supreme Court also relied on *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Stanley v. Illinois*, 405 U.S. 645 (1972). Neither case clarifies the scope of the interest nor supports the conclusion that the interest rises to the level of a fundamental right absent state interference with some other textually-based constitutional right. *Stanley* involved whether a State could presume an unwed father to be an unfit parent and deny him a hearing before taking his children away. *See* 405 U.S. at 646. Under the state law at issue in *Stanley*, neither unwed mothers or married fathers were presumed unfit and the State could not take custody of their children without a hearing establishing their lack of parental fitness. *See id.* at 650. The case raised issues of equal protection and procedural due process. *See* 405 U.S. at 657-58.

Santosky involved the evidentiary standard that a State must meet to establish the factual findings necessary to terminate parental rights. *See* 455 U.S. at 748-51. The case thus implicated procedural due process and is not relevant to the issue here. *See, e.g., id.* at 754, 758, 761 (discussing application of factors articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

pursuant to its "police power" or its "parens patriae" power. Pet. App. 15a-16a. In the lower court's view, the State could exercise its police and parens patriae powers to intrude on parental autonomy only where a parental decision "directly and severely imperiled the child," or "where a child has been harmed or where there is a threat of harm to a child." *Id.* at 16a. This view of the sources of state authority reads too much into this Court's cases and ignores the traditional state authority to establish the law of domestic relations.

Contrary to the views of the Washington Supreme Court, this Court's cases do not establish a broad principle that the State can only regulate parental autonomy in the interest of protecting children from harm. Indeed, the cases that are cited for that proposition—*Yoder*, *Prince*, and *Pierce*—all involved claims that state action intruded on both the liberty interest in parental autonomy and First Amendment rights. When First Amendment rights are implicated, the Court routinely applies a standard more onerous than rational basis review. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). The Court's repeated reaffirmation of the *Meyer* standard, which asks whether "the statute as applied is arbitrary and without reasonable relation *to any end* within the competency of the state," 262 U.S. at 403 (emphasis added), demonstrates that where state action implicates only the liberty interest in parental autonomy, the State is not limited to acting only to protect a child from harm. Indeed, were this not so it is doubtful whether the State could require that parents educate their children. *See Yoder*, 406 U.S. at 230 (describing case as "not one in which any harm to the physical or mental health of the child or to the public

safety, peace, order, or welfare has been demonstrated or may be properly inferred").

The Washington Supreme Court's holding thus ignores the longstanding authority of the States to regulate domestic relations. As the Chief Justice has explained, the area of "domestic relations . . . has been left to the States from time immemorial, and not without good reason." *Santosky*, 455 U.S. at 770 (Rehnquist, J., dissenting). "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements." *United States v. Yazell*, 382 U.S. 341, 352 (1966). Indeed, since at least *In re Burrus*, 136 U.S. 586, 593-94 (1890), the Court has recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." *Accord Boggs v. Boggs*, 520 U.S. 833, 848 (1997).

In re Burrus involved a custody dispute between the maternal grandparents and father of a child. After the death of the child's mother, the maternal grandparents took custody and raised the child for seven years. In the interim the child's father remarried and demanded that the grandparents deliver the child to him. The father filed a petition for a writ of *habeas corpus* in federal district court seeking the return of the child. The district court granted the writ and the grandparents turned over the child to her father. 136 U.S. at 587-88.

The grandparents then followed the father and child on to their train, eventually took "possession of the child with violence and against the will of the father," and returned to their home. *Id.* at 588. Thereafter, the grandparents were ordered before the district court, which held them in contempt and sentenced the grandfather to three

months imprisonment. *Id.* at 588-89. The grandfather then challenged the jurisdiction of the district court to issue the writ and jail him for contempt. *Id.* at 589. This Court upheld the challenge stating:

> In the case before us there was no pretense that the child was restrained of its liberty, or that the grandfather withheld it from possession and control of the father, under or by virtue of any authority of the United States, or that his possession of the child was in violation of the constitution or any law or treaty of the United States. The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and grandfather, it is one in regard to which neither the congress of the United States, nor any authority of the United States, has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of congress, or any treaty of the United States or its constitution.

136 U.S. at 593-94. *See also id.* at 596 ("the relations of the father and child are not matters governed by the laws of the United States").

Since *Burrus* the Court has repeatedly reaffirmed this principle. *See Boggs*, 520 U.S. at 848; *Rose v. Rose*, 481 U.S. 619, 625 (1987); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981); *Popovici v. Agler*, 280 U.S. 379, 383 (1930). And in preemption cases implicating the States' traditional authority over domestic relations, the Court has explained that "[s]tate family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden." *McCarty*, 453 U.S. at 220

(internal quotations and citations omitted); *see also Yazell*, 382 U.S. at 352 (state interests "in the field of family . . . arrangements . . . should be overridden only where clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied").

As the foregoing demonstrates, the subject matter of domestic relations law is constitutionally committed to the States. And as *Burrus* makes clear, the regulation of the relationship between grandparent, parent, and child is a matter which is "within the competency of the state." *Meyer*, 262 U.S. at 403. A state law regulating domestic relations is thus subject to review under the Due Process Clause only in the same sense that any state law is reviewable for arbitrariness or irrationality. The Court has been "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1993). The exercise of restraint is especially appropriate in an area which, since the founding, has been the exclusive province of the States. There is simply no "clear and substantial federal interest" which justifies subjecting the statute to scrutiny under a standard more onerous than rational basis review. *McCarty*, 453 U.S. at 220.

C. Washington's Statute Is Reasonably Related To The State's Interest In Regulating Domestic Relations

Washington's visitation statute is "reasonably related" to the State's regulation of domestic relations. Establishing the rules for granting visitation rights with a child is, of course, a core part of the regulation of domestic relations. *Cf. Burrus*, 136 U.S. at 593-94. In enacting its visitation statute, Washington, like the other 49 States which have enacted similar statutes, has recognized what

this Court did more than twenty years ago in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), *i.e.*, that the family unit is not limited to the traditional nuclear family and that persons such as grandparents can also properly be deemed part of a family. As this Court observed in *Moore*, the Due Process Clause does not require "cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family." *Id.* at 502; *see also Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. App. 1997) ("Grandparents are members of the extended family whom society recognizes as playing an important role in the lives of their grandchildren. . . .").

State legislatures are equally warranted in coming to the same conclusion with respect to their laws of domestic relations. Indeed, with an estimated 40 to 50 percent of all children expected to experience their parents' divorce, *see* Emmy E. Werner, "Grandparent-grandchild relationships amongst US ethnic groups," in *The Psychology of Grandparenthood—An International Perspective* 68, 73 (Peter K. Smith, ed., 1991), and 32 percent of children being born out of wedlock, U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1998* 81 (1998) (Table No. 101), the States, in enacting grandparent visitation statutes, have only responded to the reality of modern life. The reality is that grandparents (and other non-parental relatives) frequently "take on major responsibility for the rearing of the children," *Moore*, 431 U.S. at 505, even when they do not share the same household; that grandparents can play important roles in the lives of their grandchildren even when they do not have such responsibilities by serving as "mentor[s]," "role model[s]," or "family historian[s]," Werner, at 76; that grandparents' love for their

grandchild is not conditioned on whether the child was born in wedlock and does not end with a divorce or death of a parent; [4] and that parents have been known to renege, for unwarranted reasons, on their moral obligation to allow grandparent visitation.[5] The States are entitled to recognize [6] the bonafide interests of grandparent and

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[4] As one authority notes, "the results of a large study of pregnant adolescents yielded the information that the grandchild was universally esteemed in the family regardless of how the teen's parents felt about her pregnancy." Norma Radin *et al.*, "Grandfathers, teen mothers and children under two," in *The Psychology of Grandparenthood* 85, at 86.

[5] The latter is particularly the case between the custodial parent and the noncustodial grandparents. *See* Andrew J. Cherlin & Frank F. Furstenberg, Jr., *The New American Grandparent* 143-44 (1986) ("noncustodial grandparents were much more likely to report that they saw the child less often than before the marital problems began"). Moreover, "among all grandparents who were not living with the . . . child, non-custodial grandparents tended to see their grandchildren much less often than custodial grandparents." *Id.* at 146. In one study, one out of eight noncustodial grandparents "responded affirmatively to the question. 'Do you ever find that you don't spend as much time with [the child] as you would like because . . . either of [the child's] parents don't want you to see [him/her] more?'" *Id.* at 147.

Several studies have documented that "grandchildren tend to have more frequent contact with grandparents on the custodial parent's side than with those on the non-custodial parent's side. The fate of grandparent-grandchild relations following divorce is linked to the grandparent-parent relations which have evolved. . . ." Werner, "Grandparent-grandchild relationships," in *The Psychology of Grandparenthood* at 74.

[6] The Washington Supreme Court acknowledged "that in certain circumstances . . . arbitrarily depriving the child of the relationship could cause severe psychological harm to the child." Pet. App. 21a. It nonetheless invalidated the statute because the statute has "no threshold requirement of a finding of harm to the child as a result of the discontinuation of visitation." *Id.*

The State's authority to regulate the area of domestic relations is not, however, subject to the limitation that it can act only where there is a showing of harm. State courts routinely adjudicate child

grandchild in preserving their relationship notwithstanding the objection of the parent.

As the New Hampshire Supreme Court has explained:

> The realities of modern living . . . demonstrate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded . . . . More varied and complicated family situations arise as divorce, and decisions not to remarry, result in single-parent families; as remarriages create stepfamilies; as some parents abandon their children; as others give them to temporary caretakers; and as still others are judged unfit to raise their own children.
>
> One of the frequent consequences, for children, of the decline of the traditional nuclear family is the formation of close personal attachments between them and adults outside of their immediate families. Stepparents, foster parents, grandparents and other caretakers often form close bonds and, in effect, become psychological parents to children whose nuclear families are not intact. . . . It would be shortsighted indeed . . . not to recognize the realities and complexities of modern family life, by holding . . . that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family.

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custody and visitation disputes between parents based on the "best interest of the child" standard. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989).

In any event, a State can rationally conclude that where there is an established relationship between a grandparent and grandchild, severing that relationship can cause psychological harm to the child. While the former Washington statute did not require such a showing, it is clear that the Troxels had an established relationship with their grandchildren. *See* Pet. App. 55a-56a (opinion of the Washington Court of Appeals).

Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985). *See also Campbell v. Campbell*, 896 P.2d 635, 643 (Utah App. 1995); *Herndon v. Tuhey*, 857 S.W.2d 203, 209 (Mo. 1993).

Granting grandparents the statutory right to petition a court for visitation with a grandchild subject to the showing that visitation "serves the best interest of the child," R.C.W. § 26.10.160(3), bears "a reasonable relation to some purpose that is within the competency of the State." *Meyer*, 262 U.S. 400. As the dissenting opinion below observed, granting limited visitation rights is at most a "minor encroachment" on the parental liberty interest,[7] Pet. App. 31a, and it is thus not an unreasonable interference with parental autonomy rights. *See also Roberts*, 493 A.2d at 482 (quoting *Krieg v. Glassburn*, 419 N.E.2d 1015, 1019 (Ind. App. 1981) (" '[G]ranting visitation is a far lesser intrusion, or assertion of control, than is an award of custody' and thus not nearly as invasive of parents' rights.")). Indeed, a visitation decree can be modified whenever it "would serve the best interests of the child." R.C.W. § 26.10.160(4); *see also* R.C.W. § 26.09.240(10). The Washington Supreme Court's contention that granting limited visitation is "the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the 'best family,' " *id.* at 21a, is plainly erroneous.

Moreover, that a grandparent must prove that the visitation "serve[s] the best interest of the child," R.C.W. § 26.10.160(3), provides adequate protection against the

[7] In this case, the trial court ordered "visitation of one weekend per month, [starting on Saturday at 4:30 p.m. to Sunday at 6:00 p.m.,] one week in the summer, and four hours on the birthday of each of the [girls]." Pet. App. 56a; *see also id.* at 75a.

"arbitrary" application of the statute in any case. To be sure, R.C.W. § 26.10.160(3) does not enumerate a list of factors that the trial court is to consider in determining whether visitation is in the "best interest of the child." Under the since-amended companion statute, R.C.W. § 26.09.240(6), however, the trial court may consider eight factors in determining whether visitation is in the child's "best interest." These include "the strength of the relationship between the child and the petitioner," "[t]he relationship between each of the child's parents or the person with whom the child is residing and the petitioner," "[t]he nature and reason for either parent's objection to granting . . . visitation," "[t]he effect that granting visitation will have on the relationship between the child and the child's parent," "[t]he residential time sharing arrangements between the parents," the petitioner's "good faith" and history of criminality or "physical, emotional, or sexual abuse or neglect," and "[a]ny other factor relevant to the child's best interest." R.C.W. § 26.09.240(6).

While this inquiry is " 'highly fact specific,' " Pet. App. 47a, it gives substantial weight to a parent's legitimate reasons for denying visitation. Surely where a visitation statute provides such guidance to the trial court, the statute bears a "reasonable relation" to the State's interest in reconciling the rights of grandparent, parent and child, and is thus not an "arbitrary" or "irrational" interference with the parental liberty interest in directing the upbringing of children.[8]

[8] The Washington Supreme Court also reasoned that the statute was unconstitutional because it "lack[s] other safeguards to prevent stable families from defending in court against frivolous petitions for visitation." Pet. App. 22a. The court particularly noted that "the statute[] do[es] not require the petitioner to establish that he or she has a substantial relationship with the child." *Id.* Furthermore, the statute does not "require the court to take into consideration such factors as the parents' reasons for restricting visitation

* * * *

Fifty state legislatures have carefully weighed the interests of parent, child, and grandparent and concluded that grandparents should, in some circumstances, be allowed to establish that visitation with their grandchild serves the "best interest of the child." The statutes of all fifty States demonstrate that " 'the traditions and conscience of our people' " do not recognize a fundamental right in a parent to deny a grandparent visitation with a child. *Michael H.*, 491 U.S. at 122 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.)). While the Due Process Clause prohibits the arbitrary application of any state statute and requires, under its procedural component, proper notice and hearing procedures, it says nothing about how the balance between the respective persons should be struck. That determination is to be made by the States.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

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with the petitioner or any allegations of past physical or mental abuse by petitioner when making a visitation determination." *Id.*

Whatever the law may have been, it is clear that "R.C.W. § 26.09.240 now requires any nonparent seeking visitation to show that he or she has a significant relationship with the child." Pet. App. 9a. Indeed, the petitioner must make this showing "by clear and convincing evidence." R.C.W. § 26.09.240(3). Moreover, the trial court must also now consider the parent's reasons for denying visitation. *See id.* at (6)(c). It is thus clear that the statute provides sufficient standards to ensure against its arbitrary application in any case and that it bears "a reasonable relation to" the State's substantial interest in reconciling the rights of the grandparent, parent and child. *Meyer*, 262 U.S. at 400.

Respectfully submitted,

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